UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 62

Docket No. DA-0752-09-0604-P-1

Barbara R. King,

Appellant,

v.

Department of the Air Force,

Agency.

August 14, 2013

Joseph Bird, Esquire, Walled Lake, Michigan, for the appellant.

Lawrence Lynch, Randolph AFB, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 This appeal is before the Board on interlocutory appeal from the March 6, 2013 order of the administrative judge staying the proceedings and certifying for Board review her ruling that the provision of the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465, (WPEA) providing for compensatory damages does not apply to cases that were pending on the effective date of the WPEA. For the reasons discussed below, we AFFIRM the administrative judge's ruling AS MODIFIED by this Opinion and Order,

VACATE the stay order, and RETURN the appeal to the administrative judge for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant originally filed an appeal of her demotion with the Board on January 12, 2010. MSPB Docket No. DA-0752-10-0200-I-1, Initial Appeal File, Tab 1. After additional proceedings, the administrative judge issued a remand initial decision on October 3, 2012, finding that the demotion was in retaliation for making a protected disclosure under 5 U.S.C. § 2302(b)(8) and reversing the action. The initial decision became final, and the appellant filed a timely motion for consequential and compensatory damages on December 17, 2012. Addendum File (AF), Tab 1.

¶3 The WPEA was signed into law on November 27, 2012, with an effective date of December 27, 2012. On February 6, 2013, the administrative judge conducted a status conference wherein she noted that one issue in dispute was whether the appellant is entitled to an award of compensatory damages under section 107(b) of the WPEA. AF, Tab 10. She thoroughly explained that this issue turned on the legal question of whether this provision of the recently enacted WPEA would be given retroactive effect and proposed to certify that question for interlocutory review by the Board. *Id.* She offered the parties an opportunity to object to her proposed certification. *Id.* The agency did not object to the certification of an interlocutory appeal. The appellant filed an objection. *Id.*, Tab 11.

¶4 The administrative judge thereafter issued an order finding that the application of the WPEA's damages provision to cases pending prior to its effective date would have an impermissibly retroactive effect under the standards set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and would violate tenets of sovereign immunity. AF, Tab 18 at 2-5. She concluded

therefore that the appellant was not entitled to compensatory damages and certified her ruling for interlocutory review by the Board. *Id.* at 5.

¶5 The Board invited any interested individual or organization to file an amicus brief in this matter and published notice inviting amicus briefs in the Federal Register. AF, Tab 19. We received eight amicus briefs,[1] *id.*, Tabs 22-29, and thereafter served them on the parties, who submitted responses to the arguments raised by the amici. *Id.*, Tabs 32-33.

ANALYSIS

The administrative judge properly certified her ruling for interlocutory review.

¶6 An "interlocutory appeal is an appeal to the Board of a ruling made by a judge during a proceeding." 5 C.F.R. § 1201.91. Upon motion from either party, or by the administrative judge's own motion, an appeal may be certified for interlocutory review. *Id.* The Board's regulations provide for certification of a ruling for interlocutory review where "(a) the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and (b) an immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public." 5 C.F.R. § 1201.92.

¶7 The criteria for certifying a ruling for interlocutory review are met in this case. The issue as to the temporal reach of the damages provision of the WPEA is an important question of law about which there is substantial ground for difference of opinion, as evidenced by the number of amicus briefs received in this appeal and the differing views expressed therein. In addition, an immediate

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[1] Amicus briefs were received from (1) Thomas Daniels; (2) MSPB Watch; (3) Department of Veterans Affairs; (4) Department of Homeland Security; (5) Thomas Day; (6) National Whistleblower Center and Dr. Ram Chaturvedi; (7) Jacques Durr; and (8) Government Accountability Project and Brown Center for Public Policy, a.k.a. Whistlewatch.org.

ruling regarding the retroactive application of the WPEA will materially advance the completion of not only this proceeding, but many other appeals that were pending when the WPEA became effective. Therefore, the administrative judge properly certified her ruling for interlocutory review.

Congress did not expressly provide that the terms of the WPEA would apply retroactively to conduct occurring before its enactment.

¶8 We recently held that the analytical approach set forth in *Landgraf* is the appropriate framework for determining whether the provisions of the WPEA should be given retroactive effect. *See Day v. Department of Homeland Security*, 2013 MSPB 49, ¶¶ 7-9. In *Landgraf*, the Court addressed the question of retroactive application of section 102 of the Civil Rights Act of 1991, which provided the right to a jury trial and the right to recover compensatory and punitive damages for violations of Title VII of the Civil Rights Act of 1964. *Landgraf*, 511 U.S. at 247. At the outset of its discussion of that issue, the Court noted the tension between two established canons of statutory interpretation, i.e., the presumption against statutory retroactivity and the principle that courts should apply the law in effect at the time it renders its decision. *Id.* at 263-64 (internal citations omitted). In resolving that tension, the Court identified the following process for determining whether to apply a new statute to pending cases:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i. e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280. While recognizing that, in many cases, "retroactive application of a new statute would vindicate its purpose more fully," the Court deemed that

consideration insufficient to rebut the presumption against retroactivity. *Id.* at 285-86.

¶9 When Congress intends for statutory language to apply retroactively, it is capable of doing so very clearly. *See, e.g.*, *Presidio Components, Inc. v. American Technical Ceramics Corp.*, 702 F.3d 1351, 1364-65 (Fed. Cir. 2012) (giving retroactive effect to amendments enacted in 2011 in light of express statutory language applying the amendments to "all cases, without exception, that are pending on, or commenced on or after, the date of the enactment of this Act"). Here, Congress did not expressly define the temporal reach of section 107(b) of the WPEA. Rather, it provided that, with the exception of provisions not at issue in this appeal, the Act would become effective 30 days after its enactment. WPEA § 202. "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf*, 511 U.S. at 257. If anything, the fact that the effective date was 30 days after enactment suggests that retroactivity was not intended. *See AT&T Corp. v. Hulteen*, 556 U.S. 701, 713 (2009) (citing the fact that the relevant provisions of the Pregnancy Discrimination Act took effect 180 days after enactment as evidence that those provisions were not intended to have retroactive effect).

¶10 Despite clear indication in the legislative history[2] that at least some in Congress were aware of the issue concerning the temporal scope of the WPEA,

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[2] The committee report accompanying the Senate bill that was eventually approved by both houses of Congress and signed into law by the President states in relevant part as follows:

> The Committee expects and intends that the Act's provisions shall be applied in OSC, MSPB, and judicial proceedings initiated by or on behalf of a whistleblower and pending on or after that effective date. Such application is expected and appropriate because the legislation generally corrects erroneous decisions by the MSPB and the courts; removes and compensates for burdens that were wrongfully imposed on individual whistleblowers exercising their rights in the public interest; and improves

Congress did not expressly include language in the Act providing for its retroactive application. Consequently, we must determine, under *Landgraf*, whether the WPEA impairs the parties' respective rights, increases a party's liability for past conduct, or imposes new duties with respect to past transactions. As discussed below, we find that retroactive application of section 107(b) would be impermissible under *Landgraf* because it would alter the parties' respective liabilities as Congress initially contemplated in enacting the Whistleblower Protection Act (WPA).

Section 107(b) of the WPEA cannot be given retroactive effect under *Landgraf.*

¶11 The WPA, codified at 5 U.S.C. § 1221(g)(1)(A), provided that the Board has the authority to award consequential damages to an appellant in whistleblower cases. The provision, in pertinent part, stated:

> (g)(1)(A) If the Board orders corrective action under this section, such corrective action may include–
>
> > (i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and
> >
> > (ii) back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential changes.
>
> (B) Corrective action shall include attorney's fees and costs as provided under paragraphs (2) and (3).

5 U.S.C. § 1221(g)(1) (emphasis added).

¶12 The Supreme Court stated in *Morissette v. United States*, 342 U.S. 246, 263 (1952):

> the rules of administrative and judicial procedure and jurisdiction applicable to the vindication of whistleblowers' rights.

S. Rep. No. 112-155, at 51-52 (2012). That statement of intent from the Senate report was also read into the Congressional Record by a Member of the House of Representatives. *See* 158 Cong. Rec. E1664 (2012).

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Accordingly, it is an accepted principle in statutory construction that, absent legislative intent to the contrary, legal terms in a statute are presumed to have their common law meaning. 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:30 (6th ed. 2000).

¶13 Our reviewing court, the U.S. Court of Appeals for the Federal Circuit, determined that the term "consequential changes" in the WPA was "obviously a mistake" and the provision should be construed as providing for recovery of "consequential damages." *See Bohac v. Department of Agriculture*, 239 F.3d 1334, 1338 (Fed. Cir. 2001). In interpreting the provision, the court found that "historically there was no uniform common law rule . . . allowing recovery of non-pecuniary damages, much less an established common law meaning of the term 'consequential damages' that would include non-pecuniary damages in the context of contract law." *Id.* at 1341. The court also noted that, since this damages provision concerns a waiver of sovereign immunity, the waiver must be "unequivocally expressed in the statutory text and will not be implied." *Id.* at 1339 (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)) (citation omitted). In addition, the court found that "a waiver of sovereign immunity must be strictly construed in favor of the sovereign." *Bohac*, 239 F.3d at 1339 (citation omitted). Accordingly, the court held that the "consequential damages" provision in section 1221(g) was "limited to reimbursement of out of pocket costs and [did] not include non-pecuniary damages." *Id.* at 1343.

¶14 The court further noted that, if Congress had intended an appellant's recovery to include non-pecuniary damages, it likely would have used the

common law term of "compensatory damages." *Id.* at 1341. "'Compensatory damages' are the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him." *Id.* (quoting *Restatement (Second) of Torts* § 903 (1979)). They are divided into two categories: pecuniary and non-pecuniary. *Id.* (citing *Restatement* §§ 905 and 906). Pecuniary damages are awards for injuries that are subject to more or less definite standards of certainty, such as "out of pocket" losses. *Restatement* § 906. In comparison, non-pecuniary damages are "given for pain and humiliation," and "there can only be a very rough correspondence between the amount awarded as damages and the extent of the suffering." *Id.*, § 903. In *Bohac*, the court concluded that it is "well-understood that the common law term 'compensatory damages' includes non-pecuniary damages such as pain and suffering." *Bohac*, 239 F.3d at 1341.

¶15 The WPEA has now amended 5 U.S.C. § 1221(g)(1)(A)(ii) to provide that, if the Board orders corrective action, such corrective action may include "back pay and related benefits, medical costs incurred, travel expenses, *any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).*" WPEA, § 107(b) (emphasis added). Congress thus not only corrected the WPA's mistaken use of the term "consequential changes" but added "compensatory damages" to the relief available to whistleblowers.

¶16 We agree with the agency that section 107(b) is an important change in the law that attaches new legal consequences for events completed before its enactment. AF, Tab 33 at 12-13. Indeed, the issue presented here is nearly indistinguishable from *Landgraf*. In *Landgraf*, the Court examined a similar amendment to Title VII of the Civil Rights Act authorizing the award of compensatory damages for acts of intentional employment discrimination. The Court stated that:

> Unlike certain other forms of relief, compensatory damages are quintessentially backward looking. Compensatory damages may be

> *intended* less to sanction wrongdoers than to make victims whole, but they do so by a mechanism that affects the liabilities of defendants. They do not "compensate" by distributing funds from the public coffers, but by requiring particular employers to pay for harms they caused. The introduction of a right to compensatory damages is also the type of legal change that would have an impact on private parties' planning. In this case, the event to which the new damages provision relates is the discriminatory conduct of respondents' agent John Williams; if applied here, that provision would attach an important new legal burden to that conduct. The new damages remedy in § 102, we conclude, is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent.

Landgraf, 511 U.S. at 282-83. Although *Landgraf* concerned the liability of a private sector employer, the federal courts subsequently applied its holding on retroactivity to pre-enactment compensatory damages claims brought by federal employees against the United States. *See Tomasello v. Rubin*, 167 F.3d 612, 619 (D.C. Cir. 1999); *DeNovellis v. Shalala*, 124 F.3d 298, 306-07 (1st Cir. 1997); *Chenault v. U.S. Postal Service*, 37 F.3d 535 (9th Cir. 1994).

¶17 Here, the appellant's protected disclosures and the agency's retaliatory personnel actions took place several years before the effective date of the WPEA. The addition of compensatory damages significantly alters the consequences of these relevant past events and would undeniably attach an important new legal burden to the agency's past conduct that did not previously exist.[3]

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[3] The Federal Circuit has adopted a three-part test to examine the issue of whether a change in the law has an impermissible retroactive effect under *Landgraf*. They are: (1) "the nature and extent of the change of the law"; (2) "the degree of connection between the operation of the new rule and a relevant past event"; and (3) "familiar considerations of fair notice, reasonable reliance, and settled expectations." *See Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1362-63 (Fed. Cir. 2005). Because we find that the *Landgraf* holding directly controls in this appeal, it is unnecessary to use the *Princess Cruises* test in this appeal. Nevertheless, if we were to apply the test here, we would reach the same result that section 107(b) cannot be applied retroactively.

¶18 We affirm, therefore, the administrative judge's ruling on retroactivity. However, we note the Court's statement in *Landgraf* that "there is no special reason to think that all the diverse provisions of [an] Act must be treated uniformly" for purposes of retroactivity. *Landgraf*, 511 U.S. at 280. Therefore, our decision in this appeal does not necessarily apply to other provisions of the WPEA, and the question of whether a particular provision of the Act would have an impermissible retroactive effect must be addressed on a case-by-case basis.

Section 107(b) cannot be retroactively applied because Congress did not expressly waive sovereign immunity for pre-enactment conduct.

¶19 The Supreme Court has held that a "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text" and "a waiver of the Government's sovereign immunity will be strictly construed in terms of its scope in favor of the sovereign." *See Lane*, 518 U.S. at 192. Thus, "when confronted with a purported waiver of the Federal Government's sovereign immunity, the Court will 'construe ambiguities in favor of immunity.'" *Id.* at 192-93 (quoting *United States v. Williams*, 514 U.S. 527 (1995)).

¶20 The question presented here is not whether Congress consented to the federal government being sued for compensatory damages under the WPEA. The statute clearly authorizes such recovery in section 107(b). Rather, the question at issue concerns the temporal scope of that waiver, i.e., whether the Act unambiguously expressed that compensatory damages may be awarded for violations of the WPA that preceded the WPEA's enactment. The Supreme Court has recently stated that "the scope of Congress' waiver [must] be clearly discernible from the statutory text in light of traditional interpretative tools. If it is not, then we take the interpretation most favorable to the Government." *Federal Aviation Administration v. Cooper*, 132 S. Ct. 1441, 1448 (2012).

¶21 There is nothing in the express language of the WPEA from which we can discern congressional intent to waive sovereign immunity with regard to compensatory damages for violations of the WPA that preceded the enactment of

the WPEA. On the contrary, the fact that Congress established the effective date of most provisions of the WPEA, including section 107(b), to be 30 days from the date of enactment indicates that Congress did not intend the waiver of sovereign immunity in section 107(b) to be applied to conduct that occurred before enactment. *See Landgraf*, 511 U.S. at 257; *see also Hulteen*, 556 U.S. at 713. Absent any basis in the text of the WPEA to suggest that Congress intended the waiver of immunity to attach to remedies awarded based on pre-enactment conduct, we are obliged to interpret the waiver of sovereign immunity in section 107(b) in a way most favorable to the government. *Cooper*, 132 S. Ct. at 1448. Consequently, we find that the new provision authorizing the award of compensatory damages only applies to conduct and actions that occurred after the effective date of the WPEA.

Section 107(b) of the WPEA does not clarify the WPA.

¶22 The appellant does not dispute that the retroactive application of the compensatory damages provision will attach new legal consequences to events completed before the WPEA's enactment. Instead, she and several amici primarily argue that Congress enacted section 107(b) to clarify prior erroneous interpretations of the term "consequential damages" by the court and the Board. AF, Tabs 32, 29, 26, 21. In *Day*, the majority of the Board set out the standards for applying the legal principle of "clarification," stating the following:

> "Clarification, effective ab initio, is a well-recognized legal principle." *Liquilux Gas Corporation v. Martin Gas Sales*, 979 F.2d 887, 890 (1st Cir. 1992). When legislation clarifies existing law, its application to pre-enactment conduct does not raise concerns of retroactivity. *See Levy v. Sterling Holding Co.*, 544 F.3d 493, 506 (3d Cir. 2008); *Cookeville Regional Medical Center v. Leavitt*, 531 F.3d 844, 849 (D.C. Cir. 2008); *Brown v. Thompson*, 374 F.3d 253, 258-61 (4th Cir. 2004); *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689-91 (9th Cir. 2000); *Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1283-84 (11th Cir. 1999); *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993); *Liquilux*, 979 F.2d at 890. *But see Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1363 (Fed. Cir. 2005) (categorizing rules or applications of rules as "clarifications" or

> "changes" provides little insight into whether a retroactive effect under *Landgraf* would result in a particular case).
>
> In determining whether a new law clarifies existing law, "[t]here is no bright-line test." *Levy*, 544 F.3d at 506 (quoting *United States v. Marmolejos*, 140 F.3d 488, 491 (3d Cir. 1998)). For example, many courts have deemed significant any declaration by the enacting body of intent to clarify. *See Cortes*, 177 F.3d at 1284 (citing to *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980); *Sykes v. Columbus & Greenville Railway*, 117 F.3d 287, 293-94 (5th Cir. 1997); *Liquilux*, 979 F.2d at 890). *But see Levy*, 544 F.3d at 507 (finding the enacting body's description of an amendment as a "clarification" of the pre-amendment law to not be relevant to the judicial analysis). In this regard, we note that subsequent legislation declaring the intent of an earlier statute is entitled to great weight. *See Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 380-81 (1969). In addition, other factors relevant in determining whether legislative enactment clarifies rather than effects a substantive change in existing law are the presence of ambiguity in the preceding statute and the extent to which the new law resolves the ambiguity and comports with both the prior statute and any prior administrative interpretation. *Levy*, 544 F.3d at 507.

Day, 2013 MSPB 49, ¶¶ 10-11. *But see* Member Robbins' dissent in *Day*, 2013 MSPB 49 (rejecting application of the "clarification doctrine" in cases before the Board because our reviewing court found, in *Princess Cruises*, that the doctrine is inapplicable to retroactivity analysis).

¶23 The appellant relies upon the WPEA's preamble to argue that Congress intended the Act in its entirety to be applied retroactively. AF, Tab 32 at 10-11. The preamble states:

> An Act
>
> To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

The language in the preamble does not support the appellant's contention that the "entire act" is a clarification of pre-existing law. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." *United States v. Menasche*, 348 U.S. 528 (1955). The preamble states that the Act's purpose is "to clarify the disclosures of information" that are protected under the WPA. On its face, the word "clarify" as used here only modifies what is deemed to be a protected disclosure. Moreover, construing the appearance of "clarifying" in the preamble as evidence that the WPEA was generally enacted for the purpose of clarifying pre-existing law renders meaningless the other provisions in the preamble indicating that among the other purposes to be served by enactment of the WPEA is the creation of new requirements for non-disclosure agreements and the expansion of the authority given to the Special Counsel. The appellant's argument that the entire Act is solely to clarify does not give effect to all of the provisions in the preamble.

¶24 In *Day*, the Board relied in part upon the foregoing language in the preamble to support its finding that Congress intended section 101 of the WPEA—which addressed the definition of protected disclosure—to be a "clarification" of the term "disclosure" in the WPA. *Day*, 2013 MSPB 49, ¶ 12. However, we also deemed it significant that section 101 was specifically enacted under a heading identifying it as a "clarification" of disclosures covered under the law. *See* WPEA § 101. It is well accepted that "[w]here headings are enacted as part of an act, or as part of a code, or where there has been a revision, the headings may serve as an aid to the legislative intent." *See* Singer, *supra* § 47:14. Both the language in the preamble and the explicit legislative designation of section 101 as a clarifying provision supported our finding in *Day* that Congress enacted section 101 as a "clarification" of what constitutes a "disclosure" under the WPA. *Day*, 2013 MSPB 49, ¶ 12.

¶25 By contrast, here, there is simply no support in the statutory language for finding that Congress enacted section 107(b) for the purpose of clarifying existing

law as it related to remedies. On the contrary, Congress enacted section 107 under the simple heading of "Remedies" without any modifying language indicating that Congress intended thereby to clarify the scope of remedies available under the WPA. WPEA § 107. Since Congress did use the term "clarification" when it enacted section 101, its decision to not similarly label section 107 creates a strong inference that it did not intend the latter provision to be applied retroactively under the "clarification" doctrine. *See* Singer, *supra* § 46:06 ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended. In like manner, where the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.").

¶26 In support of her "clarification" argument, the appellant asserts that Congress originally intended the WPA's provision for "consequential damages" to be broadly interpreted to include "compensatory damages" and that the Federal Circuit improperly interpreted the term to be narrowly limited to only pecuniary damages. AF, Tab 32 at 8-9. Some amici also argue that the definition of "consequential" damages in the WPA should have been broadly construed to include all damages, including "compensatory damages," because non-pecuniary pain and suffering injuries are included within the scope of "consequential" damages when they are the result of wrongful conduct. *Id.*, Tabs 29 at 15-16, 26 at 4-6.

¶27 However, in *Bohac*, the Federal Circuit rejected this argument, finding that "[m]any of the authorities discussing the term 'consequential damages' cited by the parties here do not reflect common law usage at all." 239 F.3d at 1339. We have reviewed the authorities cited by the appellant and amici and agree with the court's determination in *Bohac* that they are "essentially unhelpful" in the context of this case. Furthermore, we agree with the court's well-reasoned analysis that Congress intended the definition of "consequential damages" in the WPA to be limited to the recovery of pecuniary damages. *Id.* at 1340.

¶28 Furthermore, we find that, to the extent that the meaning of "consequential damages" could be considered unclear in the WPA, Congress' intent can be determined by reference to its relationship with other words and phrases. Under the doctrine of ejusdem generis, "where general words follow specific words in a statutory construction, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Singer, *supra* § 47:17. Before the enactment of the WPEA, the law provided that, if the Board orders corrective action in an individual right of action appeal, it may include: "back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential changes." 5 U.S.C. § 1221(g)(1)(ii) (2012). The construction of this provision is a classic example of a general term, i.e., "consequential" damages, following a list of specific terms, which were a list of specific pecuniary injuries. The doctrine of ejusdem generis considers the enumeration of specific terms to provide the definition of the class to which the general term follows. In other words, the use of "consequential" damages in the provision was a catchall reference to insure that other, similar types of pecuniary losses could be recovered. Singer, *supra* § 47:17. Thus, we conclude that the term "consequential damages" did not include non-pecuniary injuries. *See Bohac*, 239 F.3d at 1342.

¶29 Indeed, if the amici's argument was correct, i.e., that "compensatory damages" are a sub-component of the broader concept of "consequential damages," it would mean that the addition of "compensatory damages" to section 107(b) is superfluous with no real meaning or effect. Furthermore, given Congress' express indication that some other provisions in the WPEA are "clarifications" of misinterpreted terms in the WPA, we find that, if Congress had also intended to correct an overly narrow interpretation of the WPA's pre-existing "consequential" damages remedy, it would have identified section 107(b) as a "clarification" and would have expressly re-defined the term to include "compensatory damages." Instead, Congress set out "compensatory damages"

and "consequential damages" as two separate, distinct remedies available under 5 U.S.C. § 1221(g)(1)(ii). Therefore, we reject the contention that the definition of "consequential damages" must include "compensatory damages."

The law of the case doctrine does not apply.

¶30 Finally, the appellant asserts that the administrative judge has already applied the WPEA retroactively to this appeal in finding her disclosures protected; therefore, under the law of the case doctrine, the issue of whether compensatory damages are available has already been established in this appeal. AF, Tab 32 at 12-15. Under the law of the case doctrine, a decision on an issue of law made at one stage of a proceeding becomes a binding precedent to be followed in successive stages of the same litigation. *Pawn v. Department of Agriculture*, 90 M.S.P.R. 473, ¶ 15 (2001). In *Hoover v. Department of the Navy*, 57 M.S.P.R. 545, 552 (1993), the Board thoroughly examined precedent and legal treatises concerning the law of the case doctrine. It stated that the law of the case doctrine refers to the practice of refusing to reopen what has been decided and of following a prior decision in an appeal of the same case. *Id.* It also noted that the law of the case doctrine "applies not only to matters which were explicitly decided in a prior decision, but also to matters decided by necessary implication" and that consistency derived from application of the law of the case doctrine avoids "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.*

¶31 Even if the administrative judge applied the WPEA's clarification of "disclosures" retroactively in this appeal, we find that the law of the case doctrine is not applicable because the issue of whether compensatory damages are available is not an issue directly, or by necessary implication, decided in the administrative judge's prior decision on the merits. As we noted above, the question of whether a particular provision of the Act may be applied retroactively must be addressed on a case-by-case basis. There is no indication in the record

that the administrative judge made any prior finding that the appellant was entitled to seek compensatory damages as part of the corrective action in this appeal. Therefore, the law of the case doctrine does not limit the Board's ability to review the issues raised in this interlocutory appeal.

ORDER

¶32 Accordingly, we AFFIRM the administrative judge's ruling AS MODIFIED by this Opinion and Order, VACATE the stay order, and RETURN the appeal to the administrative judge for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.